SUPREME COURT, U. S.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 847

CARLOS AND JACQUELINE MARCELLO,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	8
APPENDIX	A-1

CITATIONS

CASES:

Commissioner v. Heninger, 320 U.S. 467 (1943)	6
Commissioner v. Tellier, 383 U.S. 687 (1966)	6
Louis v. Garrison, 64 So. 2d 254 (1953)	5, 7
Marcello v. Bonds, 349 U.S. 302 (1954)	4
Marcello v. Caplin, (Civil Action 1126-61, U.S. Dist. Ct., Dist. of Col.)	5
Sunderland v. United States, 266 U.S. 226 (1924)	7
United States v. Fox, 94 U.S. 315 (1876)	7
United States v. Gilmore, 372 U.S. 39 (1963)	6
United States v. Marcello, 202 F. Supp. 694 (S.D. La., 1962), affirmed, 328 F.2d 961 (5th Cir., 1964), cert. denied, 377 U.S. 994 (1964)	4

Page

STATUTES:

Internal Revenue Code of 1954:
Section 162(a), 26 U.S.C. 162(a) 3
Section 212, 26 U.S.C. 212 3
Section 1034(a), 26 U.S.C. 1034(a) 3

Louisiana Civil Code:
Article 2234 7
Article 2236 3
Article 2239 3
Article 2264 4
Article 2266 4

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming in part and remanding in part a decision of the Tax Court of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix A. The relevant portions of the opinion of the Tax Court are set forth in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1967 (Appendix B). A petition for rehearing was denied on August 29, 1967 (Appendix C). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether deportation expenses of petitioners in 1957 and 1958 resulting from a 1938 conviction for the unlawful sale of marihuana are deductible in conformity with *Commissioner v. Tellier*, 383 U.S. 687 (1966), and 26 U.S.C. 162(a) and 212, as ordinary and necessary expenses incurred for the production and collection of income.

2. Whether deportation expenses incurred in 1957 and 1958 to prevent expulsion from the United States and termination of the salary of petitioner, Carlos Marcello, is an ordinary and necessary expense deductible under *Commissioner v. Heninger*, 320 U.S. 467 (1943), and 26 U.S.C. 162 (a).

3. Whether petitioners were assessed the full gain on the sale in 1958 of their former residence, contrary to 26 U.S.C. 1034(a), where it clearly appears that a new residence was purchased by them within the same year but title to the same was taken in the name of a close relative who simultaneous with the purchase acknowledged under oath that title was actually in petitioners.

4. Whether for tax purposes the Internal Revenue Service is required to give effect to the law of the State of Louisiana which recognizes petitioners as the owners of the new residence purchased in 1958.

STATUTES INVOLVED

Section 162(a) of the Internal Revenue Code of 1954 [26 U.S.C. 162(a)] provides in part:

> "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

Section 212 of the Internal Revenue Code of 1954 (26 U.S.C. 212) provides in part:

> "In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year -
>
> (1) for the production or collection of income
>
> (2) for the management, conservation, or maintenance of property held for the production of income or * * *."

Section 1034(a) of the Internal Revenue Code of 1954 [26 U.S.C. 1034(a)] provides in part:

> "If property (in this section called 'old residence') used by the taxpayer as his principal residence is sold by him after December 31, 1953, and within a period beginning 1 year before the date of such sale and ending 1 year after such date, property (in this section called 'new residence') is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price * * * of the old residence exceeds the taxpayer's cost of purchasing the new residence."

Article 2236 of the Louisiana Civil Code provides:

> "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns unless it be declared and proved a forgery."

Article 2239 of the Louisiana Civil Code provides:

> "Counter letters can have no effect against creditors or bona fide purchasers; they are valid as to all others * * *."

Article 2264 of the Louisiana Civil Code provides:

> "No notarial act concerning immovable property shall have any effect against third parties, until the same shall have been deposited in the office of the parish recorder, or register of conveyances of the parish where such immovable property is situated."

Article 2266 of the Louisiana Civil Code provides:

> "All sales, contracts, and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time but shall only affect third persons from the time of the recording."

STATEMENT

The courts below disallowed tax deductions of counsel fees paid by petitioners for the years 1957 and 1958 in resisting the deportation of Carlos Marcello. They also included for 1958 the gain on the sale of petitioners' home of $59,463.00, refusing to apply 26 U.S.C. 1034(a) in connection with the purchase and use of another home in Louisiana in the same year.

In 1938 Carlos Marcello was indicted and convicted for making two sales of marihuana in 1937 without written orders in violation of 26 U.S.C. 1399(e) and (g).[1] His sentence was a year and a day. By retroactive legislation enacted fourteen years later in 1952 [8 U.S.C. 1251(a)(11)] Marcello became subject to deportation on the basis of the 1938 conviction. *Marcello v. Bonds*, 349 U.S. 302, 313 (1954). Marcello continued to fight his removal from the United States from 1953 to the present time. On April 4, 1961, Marcello was briefly and illegally removed to Guatemala by

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[1] See: *United States v. Marcello*, 202 F. Supp. 694 (S.D. La., 1962), affirmed, 328 F.2d 961 (5th Cir., 1964), cert. denied, 377 U.S. 992 (1964).

the Immigration Service. The Commissioner of Internal Revenue on April 7, 1961, declared that he had departed without paying his taxes and entered a jeopardy assessment of $811,312.63. This was withdrawn when litigation was instituted challenging this arbitrary action. *Marcello v. Caplin* (Civil Action 1126-61, U.S. Dist. Ct., Dist. of Col.). Marcello returned to the United States in 1961 and he is again being subjected to deportation proceedings based upon his 1938 conviction.[2]

In 1957 and 1958 Marcello expended attorneys fees of $8,708.27 (R. 69) principally in defense of his deportation case.[3] The Tax Court found that these deportation expenses were personal and not deductible (R. 82). The Court below affirmed (R. 159-160).

Petitioners sold their residence in 1958 for $101,963.85, realizing a profit of $59,463.00. On March 31, 1958, the mother of Carlos Marcello, Louisa Marcello, purchased in her name a residence in Metairie, Louisiana, for $110,000.00. In a notarized affidavit dated the same day as the purchase, Louisa Marcello acknowledged that the property was placed in her name for convenience only and that the property was bought and paid for the account of Carlos Marcello (R. 154, 214). The house was paid for by petitioners, was used as the residence of petitioners, and the periodic payments of principal and interest were made by petitioners (R. 67, 68, 79). The Tax Court ruled that the affidavit of Louisa Marcello was not a counter-letter[4] under Louisiana law and that since it had not been recorded it had no probative value. It,

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[2]The Immigration Service contends that Marcello is an Italian citizen, but the Italian Government will not accept him as a deportee. No other country is willing to receive him.

[3]$1,000.00 for his tax matters was allowed by the Tax Court (R. 82).

[4]A counter-letter is a defeasance by a separate instrument or an agreement to reconvey. *Louis v. Garrison*, 64 So. 2d 254 (1953).

therefore, refused to accord petitioners the benefits of 26 U.S.C. 1034 (R. 80). The Court below agreed that petitioners had not established their ownership of the home purchased in 1958 (R. 154-156). The profit of $59,463.00 was accordingly assessed against petitioners and interest payments on the new residence were likewise disallowed (R. 78-82).

REASONS FOR GRANTING THE WRIT

1. The decisions below are contrary to *Commissioner v. Tellier*, 383 U.S. 687 (1966), and *United States v. Gilmore*, 372 U.S. 39 (1963), and misinterpret 26 U.S.C. 162(a) and 26 U.S.C. 212. It is apparent that the origin and character of the claim with respect to which the expense was incurred was the desire and attempt to produce income from the sale of marihuana. This resulted in a conviction in 1938. The expense of defending the criminal case in 1938 would have been deductible under *Commissioner v. Tellier, supra*. The conviction resulted in deportation proceedings which produced deductible tax expenses in 1957 and 1958.

The deportation penalty was superimposed retroactively as an additional sanction for Marcello's unlawful sale of marihuana for profit in 1937. The fact that the expenses herein had their origin in unlawful sales do not require their disallowance, *Commissioner v. Tellier, supra*. Moreover, the courts below did not base disallowance on such ground. The sole basis was that deportation expenses are personal and not deductible. Here, where the origin of deportation expenses derive from unlawful sales for profit which form the basis of deportation proceedings, they should be considered deductible.[5]

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[5]It is not without significance that deportation would have effectively terminated all salaries received by Marcello from the Jefferson Music Company and other income dependent upon his presence in the United States. We submit that under *Commissioner v. Heninger*, 320 U.S. 467 (1943), these deportation expenses are deductible.

2. The decisions below likewise erroneously interpret 26 U.S.C. 1034(a). Despite the contemporaneous declaration under oath by Louisa Marcello, that the house she purchased in 1958 in her name was actually for her son and daughter-in-law, the petitioners herein, despite her solemn statement[6] that actual title was in petitioners who paid for, lived in, used the residence, and made the mortgage payments thereon (R. 67, 68, 79, 154, 214), the Tax Court required recordation as a prerequisite to recognition (R. 80). It also refused to accord the Louisa Marcello affidavit effect as a counter-letter. The Court of Appeals affirmed, stating (R. 157, note 7):

> "We merely hold that this unrecorded affidavit does not justify a claim that the affidavit's beneficiary, Carlos, is a purchaser who can take advantage of section 1034."

The decisions below fail to accord proper recognition to property rights created under Louisiana law. State law controls the disposition and rules governing the ownership of real property. *United States v. Fox*, 94 U.S. 315, 320-21 (1876); *Sunderland v. United States*, 266 U.S. 226, 232-33 (1924). The courts below were concerned without cause with the fact that petitioners might not be able to assert their claim of title against bona fide purchasers, a situation not presented here. It is clear that as between petitioners and Louisa Marcello, petitioners were in fact the owners of the new residence purchased in 1958. Under Louisiana law the contemporaneous affidavit of Louisa Marcello, whether considered a counter-letter or not, was a solemn obligation to reconvey title to petitioners and a recognition of ownership in petitioners. *Louis v. Garrison*, 64 So. 2d 254 (1953). As between Louisa Marcello and petitioners, it was not necessary to record the affidavit to give it validity.

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[6]The notarized statement of Louisa Marcello is an authentic act under Louisiana law and is full proof of the agreement between the parties. Louisiana Civil Code, Articles 2234 and 2236.

Louisiana Civil Code, Article 2266. The courts below misinterpreted 26 U.S.C. 1034 by disregarding the effect of Louisiana law and by erroneously ignoring the equitable and actual owners of the new residence herein. Proper construction of this important section of our tax laws warrants the grant of certiorari herein.

CONCLUSION

The issues raised by the decisions below are of such continuing importance in the administration of our tax laws that a writ of certiorari should be granted.

Respectfully submitted,

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